



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1997

Ms. Robin Abbott
General Counsel
Texas Department of Commerce
P.O. Box 12728
Austin, Texas 78711-2728

OR97-2557

Dear Ms. Abbott:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 110530.

The Texas Department of Economic Development (the "department"), which your office represents, received a request for a copy of the Smart Jobs application of Advanced Micro Devices ("AMD"), and other recently approved applications. You have indicated that information pertaining to the other applicants for the Smart Jobs program has been released to the requestor, after consulting with the applicants. However, AMD claims that portions of their application information is confidential as it contains trade secrets.¹ The department has not raised a specific exception on its behalf under the Open Records Act for the requested information.² You have submitted for our review the requested records at issue and ask whether the information is excepted from required public disclosure. We have considered the applicable exceptions and have reviewed the submitted records.

Pursuant to section 552.305, we notified AMD, whose proprietary interests may be implicated by this request for information, and provided them with an opportunity to claim

¹We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

²Chapter 552 of the Government Code places on the custodian of public records the burden of establishing that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Generally, if a governmental body does not establish how and why an exception applies to the requested information, the attorney general has no basis on which to pronounce it protected. See Open Records Decision No. 363 (1983).

that the information at issue is excepted from disclosure. See Gov't Code § 552.305; Open Records Decision No. 542 (1990). AMD's corporate counsel responded to our notification by arguing that portions of the submitted records are excepted from disclosure under either section 552.101 or the "trade secret" prong of section 552.110 of the Government Code. Therefore, we will consider whether the requested information relating to AMD is excepted from disclosure.

Section 552.110 of the Government Code excepts from disclosure:

A trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. . . .

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision."

We first consider whether the information at issue constitutes a "trade secret." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret, as well as the Restatement's list of six trade secret factors.

RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Although in its brief to this office, AMD has addressed the six trade secret factors, we conclude that facts sufficient to show the applicability of these factors have not been provided. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Therefore, the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes "commercial or financial information." Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). Neither AMD nor the department has established that releasing the requested information would likely cause AMD to suffer

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

substantial competitive injury. We conclude that the requested information is not excepted from disclosure under the "commercial or financial information" prong of section 552.110.

Finally, we consider whether section 552.101 excepts any of the submitted information. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. We have examined the submitted information and conclude that the submitted information cannot be withheld pursuant to section 552.101. Additionally, we are not aware of any law that makes the requested information confidential, nor do you raise any such statute. Accordingly, we conclude the submitted information is not excepted from required public disclosure based on section 552.101 of the Government Code.

Since the submitted records are not excepted from required public disclosure under either claimed exception, the information must be released to the requestor. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping "S" at the beginning.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 110530

Enclosures: Submitted documents

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